84-1510

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

1984 Term

RAYMOND P. SMITH, JR.,
Petitioner,

v.

ALYESKA PIPELINE SERVICE CO., and
SOHIO PIPELINE CO.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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65 pp

QUESTION PRESENTED

Did the District Court abuse its discretion in dismissing the case at bar pursuant to F.R.C.P. 41(b) when the Petitioner was not in violation of the District Court's Order regarding trial of the case and where the Court, at hearing prior to entering the Order setting the trial date, stated that it would dismiss the suit if Petitioner could not meet his obligation under the contingency agreement with his attorney; and a later dispute arose between Petitioner and his counsel concerning payments pursuant to the contingency agreement which were not made pending resolution of the dispute, and the Court, upon motion of counsel, permitted counsel to withdraw from the suit?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, Raymond P. Smith, Jr., an individual, respectfully petitions for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals

(Appendix A infra) is not reported. The Opinion of the District Court (Appendix B infra) is also unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE AND STATUTE INVOLVED

Rule 41(a)(1) and (b):

> (a) Voluntary Dismissal: Effect Thereof.
>
> (1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of

dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operated as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(b) Involuntary Dismissal: Effect Thereof.

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and

any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

28 U.S.C. §1654.

Appearance personally or by counsel.

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, §91, 63 Stat. 103.

STATEMENT OF THE CASE

A. STATEMENT OF JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction in the Federal District Court for the District of Delaware arises under Title 28 United States Code, §§1338(a), 2201 and 2202 and Title 35 United States Code, §281.

B. THE FACTS

The patent of Petitioner involves a method of shutting down a pipeline carrying such materials as oil, when there has been a leak in the pipeline caused by either disruption such as an earthquake or other means such as sabotage. It is Petitioner's position that the Alaska pipeline could not have been completed without this invention because of the environmental concerns of the United States Government and of Alaska.

An earlier action had been brought by Petitioner against Respondents covering the same matter, which was discontinued in 1975; but this action was discontinued inasmuch as the Alaska pipeline was not then in operation. The discontinuance was without prejudice, and there was an agreement that Plaintiff could commence

another action after the pipeline was completed and in operation. The discontinuance was made on April 8, 1976.

No further action was taken by Plaintiff until June 18, 1981, when a Complaint was filed in the District Court for the District of Delaware covering the patent. The firm of Cushman, Darby & Cushman of Washington, D.C. represented Plaintiff in the action filed in June of 1981. Substantial discovery was taken during the period June 19, 1981, to October of 1983 (J.A. 2-5 inclusive)[1].

On October 20, 1982, Petitioner's counsel, the Cushman firm, notified

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1. Citations to the record as reprinted in the joint Appendix submitted to the Court of Appeals will be denoted as "J.A.". Citations to materials in the Appendix following this Petition will be denoted as "App.". Plaintiff demanded a jury trial.

Petitioner that they were going to withdraw from the suit (J.A. 92). The firm filed a motion in February of 1983 which was granted by the Court on March 2, 1983, and not opposed by Petitioner (J.A. 92, 93), although Petitioner did not realize that he had a right to oppose the withdrawal (J.A. 93). There was a dispute between Petitioner and the Cushman firm involving the contingency agreement under which they were operating (J.A. 93).

At the hearing before the Court on an Order of Court to show cause why the case shouldn't be dismissed or Petitioner proceed with prosecution of it (J.A. 91) held April 15, 1983, the Court did advise Petitioner of his right to proceed pro se (J.A. 96). Petitioner requested time to obtain other counsel to represent him or

to proceed pro se or to dismiss the case without prejudice (J.A. 97). At no time in this proceeding did Petitioner waive his right to proceed pro se. The Court, by Order dated April 15, 1983 (J.A. 88, 89), ordered that either substitute counsel be obtained by May 16, 1983, or the case be prosecuted pro se. The Court also set a date for jury trial of October 11, 1983.

At the hearing of April 15, 1983, Defendants' position was that the case was a frivolous one, that there had been numerous counsel in the case before, that Petitioner had contacted at least five law firms between 1976 and 1981 in an effort to obtain representation for the suit brought in 1981, and argued to the Court that this indicated that the suit was frivolous (J.A. 99). However, at the

hearing of November 29, 1983, Petitioner's counsel, then Irons & Sears, stated specifically that they did not want to withdraw from the case because they believed it had no merit (J.A. 57).

Respondents, in their brief in the Circuit Court of Appeals, stated that Petitioner specifically agreed to the Scheduling Order of April 15, 1983, (Respondent's Brief, Page 4) and citing J.A., Pages 88, 89 and 104. Nowhere on those pages in the joint appendix does it appear that Petitioner specifically agreed to the Scheduling Order. In fact, the Scheduling Order was not issued at the hearing of April 15, 1983, (J.A. 105 and 106).

On June 7, 1983, Petitioner entered into a contingency agreement with the law firm of Irons & Sears (J.A. 122 through

125), who entered their appearance for Plaintiff on June 14, 1983, (J.A. 108). The contingency agreement made no mention of what would happen if a dispute arose between Irons and Sears and Petitioner regarding amounts to be paid under the contingency agreement. The Court held a hearing on July 22, 1983, on the motion of Irons & Sears made on June 8, 1983, to have the Scheduling Order modified so that they might properly prepare the case.

At the hearing held on July 22, 1983, the Court, pursuant to motion of Irons & Sears of Washington, D.C., permitted their representation of Petitioner and in addition, the parties agreed to a scheduling order which set the trial of the case for January 16, 1984 (J.A. 28-34). In addition, the parties agreed that if

the case was not tried on January 16, 1984, that the case would be dismissed (J.A. 28, 29). At this hearing, there was no request by the Court that Petitioner waive his statutory right to proceed pro se if he was unrepresented by counsel. The Court did indicate that it would be a "fiasco" if Petitioner attempted to proceed pro se before a jury (J.A. 27). Irons presented to the Court a proposed paragraph that if the case failed to proceed in accordance with the schedule, whether because of a failure to abide the determination of a contingency arrangement with Irons & Sears or for other reasons, this case would proceed to trial, either on the schedule set forth or upon such other schedule as may be determined by the Court (J.A. 13). The Court stated that although he didn't

believe Petitioner was competent to try the case pro se, although he had that right, that the Court would force him to try it if he had no attorney, the Court already had entered that kind of Order (J.A. 13). Then there was a colloquy between the Court and Irons concerning the possibility of continuing pro bono which Irons stated that he was not prepared to do by stipulation or agreement (J.A. 14). Immediately thereafter, the following colloquy occurred:

> By The Court: "Mr. Smith, do you see what your counsel is proposing?
>
> Mr. Smith: Yes I do.
>
> The Court: Do you understand it?
>
> Mr. Smith: Yes.
>
> The Court: And if you can't meet his obligations that you have under this contingency agreement to pay for the expenses of this suit, you know that

I am going to dismiss it?

Mr. Irons: When the Court says "dismiss it", he means it is over and you lose, if I may say that.

Mr. Smith: Yes I understand that."

After lengthy colloquy with defense counsel concerning objections, the parties and the Court made proposals and agreements concerning the Scheduling Order which contained Paragraph 4 of the Court's Order heretofore referred to. Petitioner specifically agreed to the provisions of the Scheduling Order (J.A. 28) providing that if the trial did not go forward on January 16, the case would be dismissed. The only agreement of the parties was to the Order of Court. The Court made no Order that it would dismiss the suit simply upon the withdrawal of Irons and Sears. Furthermore, nothing was stated at the hearing of July 22,

1983, what would happen if Petitioner and Irons and Sears had a dispute about the amount due under the contingency agreement.

Thereafter, on November 17, 1983, Irons and Sears moved to withdrawal (J.A. 5, 113). The District Court held a hearing on November 29, 1983, at which time Petitioner informed the Court that there was a dispute between him and Irons and Sears about what was due under the contingency agreement (J.A. 42). Without consideration of the dispute that had arisen between Petitioner and Irons and Sears, the Court, dismissed the suit and stated its reasons in a Memorandum filed December 9, 1983 (App. A). An appeal was taken to the Circuit Court of Appeals for the Federal Circuit on December 27, 1983. The Court of Appeals for the Federal

BEST AVAILABLE COPY

Circuit affirmed the holding of the District Court by an unreported Opinion dated December 21, 1984 (App. B). At the time the case at bar was dismissed by the District Court, the case was of less than two and one-half years old.

C. THE OPINION OF THE DISTRICT COURT

The District Court recited the facts of this case and indicated that it viewed the case as being eight and one-half years old (App. A, Page 2a). Further, the Court held that the parties had agreed to a stipulation and that therefore, pursuant to F.R.C.P. 41(a)(1), he was merely enforcing an agreement of the parties. Paragraph 4 of the Court's Order of July 22, 1983 provided as follows:

> 4. "In the event that Plaintiff fails to proceed in accordance with the schedule set forth in paragraph

> 2, whether because of a failure to abide the terms of the contingency arrangement with Irons and Sears (resulting in the withdrawal of said firm from this suit) or for any other reason, this case will be dismissed with prejudice."

The Court further stated that the case was due for dismissal in the sound discretion of the Court and stated that the litigation had been held over the Defendants' heads for more than eight and one-half years. It also stated that the recently amended Federal Rules of Civil Procedure have emphasised that a trial court is obligated to exercise control over scheduling and managing litigation assigned to it. Finally, the Court had concluded that the case would become a fiasco if tried pro se and that Plaintiff and his counsel had agreed that the action could be dismissed if the condition (withdrawal of the Irons and Sears

firm) that did occur would happen.

D. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Court of Appeals dismissed the case on the grounds that the Plaintiff had made a commitment at the hearing on July 22, 1983, that "if he failed to pay his lawyer, the suit would be dismissed" and on the further ground that the District Court had not abused its discretion in dismissing the suit pursuant to F.R.C.P. 41(b).

REASONS FOR GRANTING THE WRIT

Petitioner's position in this case is that it was dismissed prematurely by the District Court in that no part of the Scheduling Order, which was developed by the parties and the Court at the hearing of July 22, 1983, was being violated at the time of the dismissal of the suit by

the Court. The dismissal on the basis that there was an agreement by Petitioner that if his counsel withdrew for any reason, the case would be dismissed is simply not born out by the record. What was agreed to provided only that the case had to proceed in accordance with the Scheduling Order, and it was only if the case did not so proceed as a result of the withdrawal of counsel that the case would be dismissed.

The District Court used as a further basis for its dismissal of the case the amended Federal Rules of Civil Procedure in 1983, emphasizing that a trial court is obligated to exercise control over scheduling and managing litigation assigned to it.

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING THE CASE AT BAR SINCE:

A. THE SCHEDULING ORDER AND PARAGRAPH 4 THEREOF WERE AN INTEGRATION OF WHAT OCCURRED AT THE HEARING OF JULY 22, 1983, AND NO PART OF THE SCHEDULING ORDER WAS VIOLATED AT THE TIME THAT THE SUIT WAS DISMISSED.

Both the District Court and the Court of Appeals relied for dismissal upon a colloquy which occurred at the hearing of July 22, 1983, and is found on Page 15 of the joint Appendix. This colloquy is as follows:

> By The Court: "Mr. Smith, do you see what your counsel is proposing?
>
> Mr. Smith: Yes I do.
>
> The Court: Do you understand it?
>
> Mr. Smith: Yes.
>
> The Court: And if you can't meet his obligations that you have under this contingency agreement to pay for the expenses of this suit, you know that I am going to dismiss it?
>
> Mr. Irons: When the Court says "dismiss it", he means it is over

and you lose, if I may say that.

Mr. Smith: Yes I understand that."

This colloquy occurred early in the hearing of July 22, 1983 (J.A. 15). Thereafter, there were many objections noted by Counsel for Defendant and Counsel for Defendant did not indicate that he agreed with the Court's statement above and opposed any rescheduling of the matter continually during the hearing. Toward the end of the hearing, the parties and the Court together constructed the Scheduling Order and Paragraph 4 thereof. It was this Scheduling Order which Plaintiff was asked to agree to and did agree to (J.A. 28). This was the agreement of the Plaintiff and any reasonable

construction of that agreement is that the condition that was present was that dismissal would be predicated on whether the case went forward on January 16, 1984, or not.

The proposal of Irons was similar to what the Court' Scheduling Order provided in Paragraph 4. That is, the dismissal was expressly predicated on the case failing to go forward in accordance with the Scheduling Order. Such had not occurred when the District Court dismissed the case. Furthermore, the District Court characterized this colloquy as "an agreement between the parties". Such was never agreed to by Counsel for Defendant. The only thing that Counsel for Defendant "had no objection to" (J.A. 15), was the provision which

finally appeared in the Scheduling Order in Paragraph 4, that if the case did not go forward per the Scheduling Order, it would be dismissed. Again, such was not the case when the Court dismissed the case at bar. Petitioner's response to the Court's inquiry was only that he understood what the Court was saying, not that he agreed with what the Court was saying.

Finally, it is submitted that what finally came out of the hearing of July 22, 1983, was an integration of all prior colloquy. The Scheduling Order simply did not provide for dismissal in the event that Irons and Sears withdrew unless the case did not go forward as scheduled. There was no discussion of what would happen if an honest dispute arose between

Petitioner and Irons and Sears. That there was an honest dispute as is indicated both by Petitioner's statement of it at the hearing of November 29, 1983 (J.A. 42), and by the fact that Irons and Sears compromised substantially their expense claim in a suit against Plaintiff and this counsel (J.A. 164-166 inclusive, 168, 169-171 inclusive). In its Memorandum Opinion (App. A), the Court never discussed what the contentions of Petitioner were at the hearing of November 29, 1983. Nor did the Court of Appeals take into consideration the Petitioner's contentions.

Furthermore, the only thing that the contingency agreement provided was that Irons and Sears could petition to withdraw as counsel if the agreement

was in arrears. It made no provision for the dismissal of the case. That had to be done by the Court. Thus, the case at bar was dismissed for failure to prosecute at a time when the Scheduling Order was being adhered to, and at a time when the only agreement to which Petitioner had agreed was that it would be dismissed if the Scheduling Order were not adhered to, and at a time when the case was less than two and one-half years old.

B. PLAINTIFF WAS NOT REQUESTED TO WAIVE HIS RIGHT TO PROCEED PRO SE AND DID NOT WAIVE HIS RIGHT BY AGREEING TO THE SCHEDULING ORDER

Nowhere in the record was the word waiver used in connection with Petitioner's right to proceed pro se. This right is guaranteed by Act of

Congress 28 U.S.C. §1654. Although the provisions of that Act may be waived, Watts v. U.S., 273 Fed. 2d 10, Cert. Den. 80 S. Ct. 1069, 362 U.S. 982, 4 L. Ed. 2d 1017 (C.A. Arizona 1960), it is submitted that if the question is whether someone is agreeing to the dismissal of their suit and which places that power in the hands of his counsel even if there is a legitimate dispute over what is due under the expenses agreement relating to the suit, it should be done by an explicit and intelligent waiver on the part of the party. It is submitted that waiver as such was never discussed with Petitioner either by the Court or by Irons and Sears or by the Defendant in this matter.

II. THE FEDERAL COURTS ARE CONFUSED WITH RESPECT TO THE 1983 AMENDMENTS OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THEIR EFFECT ON THE DISCRETION OF DISTRICT COURTS TO DISMISS ACTIONS FOR VIOLATION OF SAID AMENDMENTS AND THEIR RELATION TO THE PRIMARY PURPOSE OF THE FEDERAL RULES OF CIVIL PROCEDURE OF HAVING CASES TRIED ON THEIR MERITS.

Although the Federal Rules of Civil Procedure are designed to obtain a speedy and inexpensive determination of every action, it should be noted that prior to the words "speedy and inexpensive" in Federal Rule of Civil Procedure 1, is the word "just". It is submitted that the positioning of the word "just" ahead of the words "speedy" and "inexpensive" was not by chance. It is further submitted that the object of the Courts is and should be justice, and not simply speed and

without cost. It is submitted that the revisions of the Rules of Civil Procedure in 1983, although designed to expedite legal actions, were not designed to cause the dismissal prior to trial of suits on their merits. First of all, neither Rules 41 nor 37 were amended by those rules. Secondly, those rules provided sanctions other than dismissal as a means of obtaining expedition of the suit.

Recently, there has been substantial confusion among the circuits as to the meaning of the 1983 revision of the Rules of Civil Procedure. As in this case, the Federal Circuit Court of Appeals agreed that Judge Lutchum had discretion to dismiss the case at bar. The attitude of the District Judge with respect to the rule changes

of 1983 aptly demonstrates that some judges feel that these changes should be used to dismiss litigation that otherwise would not be dismissed. In contrast to this attitude are the recent Third Circuit cases of Poulis v. State Farm Fire and Casualty Co., 747 F. 2d 863 (Third Circuit 1984) and Scarborough v. Eubanks, 747 F. 2d 871 (Third Circuit 1984). In the case at bar, neither the District Court nor the Court of Appeals considered whether alternative sanctions might be appropriate.

The following language appears in the case of Poulis v. State Farm Fire and Casualty Co., 747 F. 2d 863, 867 (Third Circuit 1984):

> "We recognize that recent literature exhorting the district judges to move litiga-

> tion expeditiously by taking firm control and the 1983 amendments of the Federal Rules of Civil Procedure with their numerous references to sanctions may have contributed to premature dismissals or defaults. Although sanctions are a necessary part of any court system, we are concerned that the recent preoccupation with sanctions and the use of dismissal as a necessary 'weapon' in the trial court's 'arsenal' may be contributing to or effecting an atmosphere in which the meritorious claims or defenses of innocent parties are no longer the central issue."

Petitioner urges this Court to consider whether this language is appropriate in the case at bar and to the question of whether this case should be tried on its merits rather than be dismissed at a time when the Court's Scheduling Order was being adhered to.

CONCLUSION

Petitioner urges this Court to reverse the decision of the Court of

Appeals for the Federal Circuit and remand the case to the District Court for trial on the merits.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 84-731

RAYMOND P. SMITH, JR.,
Petitioner,

v.

ALYESKA PIPELINE SERVICE CO., and
SOHIO PIPELINE CO.,
Respondents

William J. Wier, Jr. of Kreshtool, Wier & Waserstein, Wilmington, Del., Edward S. Irons and Thomas J. Morgan of Irons and Sears, Washington, D.C., of counsel, for plaintiff.

Raymond P. Smith, Jr., pro se.

Januar D. Bove, Jr. of Connolly, Bove, Lodge & Hutz, Wilmington, Del., Garrett R. Tucker and Allan Rosenthal of Baker & Botts, Houston, Texas, of counsel, for defendants.

MEMORANDUM

LUTCHUM, Chief Judge.

I. THE FACTS

This patent litigation had its beginnings in this Court almost eight and a half year ago, on July 22, 1975, when Craftmaster, Inc., a corporation controlled by Raymond P. Smith, Jr., instituted a patent infringement action against Alyeska Pipeline Service, Inc. ("Alyeska") (C.A. No. 75-210, Docket Item ["D.I."] 1). In that suit plaintiff alleged that the defendant was infringing U.S. Patent 3,741,233 ("the '233 Patent") because the system for protection of the environment against leaks from an oil pipeline was being incorporated by defendant into the Trans Alaskan Pipeline System ("TAPS"). At the time that suit was brought plaintiff was represented in addition to local counsel by the firm of Sughrue, Rothwell, Mion, Zinn & MacPeak

of Washington, D.C. The defendant moved to dismiss under Rule 12(b)(6), Fed.R.Civ.P., but before the dismissal motion was briefed and argued, the Sughrue, Rothwell firm withdrew as counsel and Charles Marmelstein of the firm of Armstrong, Nikaido & Wegner of Washington, D.C., took over as plaintiff's patent attorney. On April 8, 1976, the first patent infringement action on the '233 Patent was dismissed without prejudice upon the joint motion of both parties. (D.I. 47, Ex. 2.)

Thereafter between April 27, 1977 and July 1, 1980, plaintiff solicited five different patent law firms to represent him in bringing a second infringement suit against Alyeksa.[1]

---

1. Those law firms were: (1) Armstrong,

Those firms according to plaintiff were unwilling to accept the representation of plaintiff mainly for financial reasons. (Id.) Sometime after July 9, 1980, the patent law firm of Cushman, Darby and Cushman of Washington, D.C., agreed to represent the plaintiff and on June 18, 1981, filed this second and present infringement action based on the '233 Patent. A jury trial was timely demanded. (D.I. 1 & 8.)

The present case proceeded in a normal fashion. Discovery was undertaken by both sides. Various motions relating to discovery and a motion for separate

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1. (continued) Nikaido & Wegner of Washington, D.C.; (2) Dilworth, Paxson, Kalich, Levy & Kaufman of Philadelphia, Pa.,; (3) Martin Lobel, Esq.; (4) Blum, Parker & Nash, Washington, D.C.; (5) John Youngman of Candor, Youngman, Gibson & Gault of Williamsport, Pa. (D.I. 47, Ex.)

trial on liability were briefed, argued and decided. Smith v. Alyeska Pipeline Service Co., 538 F. Supp. 977 (D.Del. 1982).

However, on February 4, 1983, plaintiff's attorneys, after giving prior notice to plaintiff on October 20, 1982, moved for permission to withdraw as plaintiff's counsel because of plaintiff's failure to pay litigation expenses as he agreed to do in his contingent fee agreement. (D.I. 46.) The defendants did not oppose the motion of plaintiff's attorney to withdraw "as no lawyer should be required, or expected to continue service his client under such conditions." (D.I. 47.) In addition, defendants requested that a future date be set at which time the complaint would be dismissed unless before that date plain-

tiff obtained substitute counsel and agreed that defendant could proceed to complete their pretrial discovery. (Id.) After considering these two applications, the Court entered a Memorandum and Order, dated March 2, 1982, permitting plaintiff's counsel to withdraw (D.I. 48 & 49), and further ordered:

> Unless the plaintiff obtains substitute counsel of record in this action and proceeds to prosecute this case actively, including cooperation with defendants for them to complete their pretrial discovery, on or before 9 a.m. on Friday, April 15, 1983, then the Court will hold a hearing at that time and date in Courtroom No. 1, U.S. Courthouse, Wilmington, Delaware, at which time the plaintiff shall show cause why this case should not be dismissed for failure to prosecute.

(D.I. 49.)

When no substitute attorney for plaintiff had appeared during that six

week period, a hearing was held on April 15, 1983, on the show cause order issued to the plaintiff. (D.I. 55.) Following that hearing at which plaintiff appeared, the Court filed a memorandum dated April 15, 1983, which stated in part:

> The record shows that plaintiff has not obtained substitute counsel since October 20, 1982, when the previous counsel notified him that they intended to apply to this Court to withdraw. Plaintiff's former attorneys moved to withdraw on January 31, 1983, and after a hearing at which plaintiff did not appear and object, the motion was granted, on March 2, 1983.
>
> At today's hearing, plaintiff pleaded that he be granted an additional thirty days to obtain counsel. Plaintiff did not present very good reasons for this request. Nevertheless, the Court will, over defendants' objections, grant the plaintiff an additional thirty days to obtain substitute counsel and if none is obtained by that time, plaintiff will have to prosecute this suit himself.

(D.I. 53.)

The defendants also suggested a pretrial schedule for completion of this case with trial scheduled to begin on September 15, 1983. (Id.) Plaintiff examined defendants' proposed schedule and agreed with it provided that it was adjusted by the Court to push forward all suggested dates by 30 days to give plaintiff an additional 30 days to obtain substitute counsel. (D.I. 54, 55 at 14-15.)

Despite the insufficient reasons presented for the extension of time, the Court nevertheless reluctantly granted the additional time and entered an order on April 15, 1983, which in pertinent part provided:

> 1. Plaintiff is granted leave to and including May 16, 1983, in which to obtain substi-

tute counsel of record in this proceeding; and in the event substitute counsel does not appear of record on or before May 16, 1983, this case shall be prosecuted by the plaintiff pro se.

2. The Court hereby establishes the following pretrial schedule for this action:

June 6-7, 1983 - Defendants depose plaintiff.

June 13-16, 1983 - Defendants complete their pretrial depositions.

July 7, 1983 - Requests for Admissions (if any) to be served and filed by the parties.

July 21, 1983 - Answers to Requests for Admissions to be served and filed.

July 21, 1983 - Discovery period ends.

August 1, 1983 - All motions of the parties shall be served and filed including summary judgment motions and the moving party shall file the main brief with their motions, answering briefs shall be filed and served on or before August 11, 1983, and reply

> briefs (if any) shall be filed and served on or before August 17, 1983.
>
> If the Court had disposed of all pending motions before September 26, 1983, then the following schedule shall be followed:
>
> September 26, 1983 - Pretrial Stipulation and Order required by Local Rule 5.4 and special jury voir dire questions and proposed jury instructions shall be served and filed. September 29, 1983- Final Pretrial Conference. at 10:00 A.M. October 11, 1983 - Jury Trial begins. at 10:00 A.M.

(D.I. 54.)

In accordance with the above order, defendants took plaintiff's deposition on June 8, 1983. (D.I. 63.) On the same date, the Court received a letter and emergency motion from Edward S. Irons of the firm of Irons and Sears. (D.I. 64.) The gist of those documents indicated that on June 6, 1983, plaintiff had contacted the Irons firm to represent him in

this case and that the firm agreed to represent plaintiff only upon condition that this Court extend the above pretrial schedule for an additional sixty days and that the Court suppress plaintiff's deposition taken on June 8. (D.I. 64.)

On June 15, 1983, the Court wrote to Mr. Irons and advised him that there was no rule for contingent appearance of counsel so as to permit withdrawal unless the Court does or does not render a particular decision to the liking of such appearing counsel. (D.I. 66.) Defendants objected to plaintiff's so-called emergency motion. (D.I. 61.)

When this Court had completed another trial in which it was presiding, the Court set argument for July 22, 1983, to determine whether Irons and Sears was going to represent plaintiff and to con-

sider plaintiff's emergency motion. (D.I. 67.) A hearing was held on July 22, 1983, attended by plaintiff, Edward S. Irons, and Thomas J. Morgan of Irons and Sears, then local counsel, and defendants' counsel. (D.I. 76.)

After hearing oral argument of opposing counsel on plaintiff's emergency motion (D.I. 76 at 1-19), the Court stated:

> Here is what I am inclined to do, and I hope you two gentlemen, when I leave the bench for a few minutes, can see if you can work something out. I am willing to give Mr. Smith one more time with his counsel in this case before it is tried and that he has counsel - I can see that it would be a fiasco if he attempted to go to trial with a jury and he were trying the case himself . . . and Mr. Irons is not even willing to undertake it if trial stays on the October 11 date. I would be willing to change the trial to begin January 16, which is a Monday.

(D.I. 76 at 19.)

Defendants' attorney then asked the Court:

> In view of your statement that you are going to give them one more chance-I remember hearing that the last time I was here-may we have in the order a provision that if the trial does not go forward on January 16 because of some problem on plaintiff's side the case will be dismissed.

Id. at 20.

Court, defendants, Mr. Irons as well as the plaintiff personally agreed to a dismissal with prejudice if plaintiff failed to go forward with trial. (Id. at 19-20.)

Following the recess, the parties agreed upon, prepared and approved the terms of a proposed Order which the Court signed on July 22, 1983, that stipulated Order reads:

ORDER

Pursuant to a hearing held in open court on Friday, July 22, 1983, it is hereby ORDERED:

1. Plaintiff's motion to suppress the deposition of Raymond P. Smith, Jr., taken June 8, 1983, is denied.

2. The parties have agreed to, and the Court hereby establishes, the following pretrial schedule for this action:

October 21, 1983	Discovery period ends.
October 21, 1983	Requests for Admission (if any) to be served and filed by the parties.
November 8, 1983	Answers to Requests for Admission (if any) to be served and filed.
November 21, 1983	All motions of the parties shall be served and filed including summary judgment motions, and the moving party shall file the main brief with its motions, answering briefs shall be served and filed on or before December 5, 1983, and reply briefs (if any) shall be served and filed on or before December 12,

	1983.
December 21, 1983 at 10:00 A.M.	Initial Pretrial Conference - All pending Motions to be decided.
January 6, 1984	Pretrial Stipulation and Order required by Local Rule 5.4 and special jury voir dire questions and proposed jury instructions (if the jury is still demanded) shall be served and filed.
January 13, 1984 at 10:00 A.M.	Final Pretrial Conference.
January 16, 1984 at 10:00 A.M.	Trial begins.

3. This case will proceed pursuant to the schedule recited in paragraph 2, and no further modifications or changes in such schedule will be granted at the behest of the plaintiff.

4. In the event that plaintiff fails to proceed in accordance with the schedule set forth in paragraph 2, whether because of a failure to abide the terms of the contingency arrangement with Irons and Sears (resulting in the withdrawal of said firm from this suit) or for any other reason, this case will be dismissed with prejudice.

5. Counsel for the plaintiff will advise this Court and opposing counsel in writing no later than October 21, 1983 if the plaintiff withdraws his demand for a

trial by jury.

6. The plaintiff, Raymond P. Smith, Jr., was present in this Court at a hearing held July 22, 1983 which addressed the matters set forth in this order, and has indicated in open court that he has agreed with it in all respects.

(D.I. 71.)

The plaintiff, who heard the provisions of the stipulation discussed in open court, was directly addressed by the Court and plaintiff stated, "I have no objections" to any of the provisions or schedule. (D.I. 76 at 27.) The plaintiff also realized that if he could not "meet his obligations that [he had] under this contingency agreement [with the Irons firm] to pay for expenses of this suit, [he knew the Court] is going to dismiss it?"

Mr. Irons then interjected: "When the Court says 'dismiss it' he means it

is over and you lose, if I may say that." Plaintiff replied: "Yes, I understand that."

The case then proceeded on the revised schedule and the Court decided a number of plaintiff's motions by an Omnibus Order entered on October 20, 1983. (D.I. 143.) On November 11, 1983, plaintiff's attorney moved to withdraw from the case because plaintiff had failed to meet his financial obligations for expenses since September 30, 1983. (D.I. 151 & 151A.) The defendants also moved to dismiss the case with prejudice. (D.I. 152.) Both motions were set down for hearing on November 29, 1983. (D.I. 154.) After hearing the arguments of opposing counsel and the comments of the plaintiff personally (D.I. 159), the Court entered an order on that date per-

mitting plaintiff's attorneys to withdraw and dismissing this action with prejudice. (D.I. 156.)

II. DISCUSSION

Rule 41(a)(1), Fed.R.Civ.P., in pertinent part reads:

> Subject to the provisions of Rule 23(e), of Rule 66, and any statute of the United States, an action may be dismissed . . . by filing a stipulation of dismissal signed by all the parties who have appeared in the action.

The order dated July 22, 1983 (D.I. 71), which was negotiated, drafted and approved by the parties, including the plaintiff personally, expressly provided in paragraph 4 that, in consideration for granting the plaintiff and his counsel a further 60-day extension of time that they were requesting, the plaintiff agreed that if plaintiff failed to meet his obligations under his contingency

agreement with Irons and Sears, the case would be dismissed. (D.I. 71.)

Thus, the July 22d order amounted to a stipulation of dismissal subject to a condition subsequent. When the express condition was thereafter met, viz. plaintiff's failure to fulfill his financial obligations causing Irons and Sears to withdraw as his counsel, the Court, under the agreed-upon order was fully justified in dismissing the action with prejudice. The Court in dismissing the case was doing no more than enforcing an agreement entered into by the parties. See Aro Corp. v. Allied Witan Co., 531 F. 2d 1368 (6th Cir. 1976).

But aside from this, the case was due for dismissal as a matter of the sound discretion of the Court. This patent litigation in one form or another has

been held over the defendants' head for more than eight and a half years. A defendant has the right to have a case promptly decided. This Court, as shown by the facts outlined above, gave every consideration to the plaintiff in granting extensions of time for pretrial proceedings and trial. The time arrived when the Court was required to act in the interest of fairness and justice to bring the case to a conclusion. The recently amended Federal Rules of Civil Procedure have emphasized that a trial court is obligated to exercise control over scheduling and managing litigation assigned to it. The power to invoke the sanction of dismissal is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion of the Court's calendar. Link v. Wabash

Railroad Co., 370 U.S. 626 (1962).

The last attorneys to withdraw are the fourth set of attorneys who have represented Mr. Smith in this eight and a half years of litigation. The defendants have been put to substantial expense in defending themselves against the infringement charges over this protracted period of time. The time arrived when the case should be brought to a close particularly when there was no end in sight for a jury trial in which plaintiff was represented by an attorney. The trial, as the Court concluded on July 22, 1983, would become a "fiasco" if tried pro se by the plaintiff. To avoid such a fiasco and to give additional time for plaintiff and his counsel to prepare for trial, plaintiff and his counsel solemnly agreed that the action could be dismissed

if the condition that did occur would happen.

It was for the above reasons that this action for infringement of the '233 Patent was dismissed for a second time with prejudice. See Rule 41, Fed.R.Civ.P. This constitute the findings of facts and conclusions of law in support of the dismissal order entered on November 29, 1983. (D.I. 156.)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 84-731

RAYMOND P. SMITH, JR.,
Petitioner,

v.

ALYESKA PIPELINE SERVICE CO., and
SOHIO PIPELINE CO.,
Respondents

DECIDED: December 21, 1984

Before FRIEDMAN, RICH, and BALDWIN, Circuit Judges. BALDWIN, Circuit Judge.

DECISION

The decision of the district court dismissing the case of appellant-plaintiff Smith with prejudice is affirmed.

OPINION

This patent infringement litigation began in the United States District Court for the District of Delaware in July,

1975. On the joint motion of the parties, that suit was dismissed without prejudice in April 1976.

A second suit was filed in June 1981. Counsel for the appellant withdrew from that suit in March 1983 because the appellant had failed to pay the lawyer's out-of-pocket expenses in accordance with the retainer. The district court granted various extensions of time to enable the appellant to retain new counsel. In April 1983, the court granted the appellant a month to obtain counsel or to proceed to prosecute the case pro se. The court also established a schedule for discovery and set a trial date in October 1983.

About two months later, Edward S. Irons of the firm of Irons & Sears filed a motion stating that the appellant had

requested the law firm to represent him but that the law firm would do so only if the court extended the discovery schedule and the trial date by 60 days, and seeking such an extension. At a hearing on that motion on July 22, 1983, Mr. Irons described his agreement with the appellant regarding fees and expenses. The court then asked the appellant:

> And if you can't meet his obligations that you have under this contingency agreement to pay for the expenses of this suit, you know that I am going to dismiss it?

Mr. Irons added that "When the Court says 'dismiss it,' he means it is over and you lose, if I may say that." The appellant replied, "Yes, I understand that." The court then postponed the trial to January 16, 1984.

In November 1983, Mr. Irons moved to

withdraw because the appellant had not paid the firm. After a hearing, the district court granted the motion to withdraw and dismissed the case with prejudice. In a 10-page memorandum, the district court described the history of the litigation and explained its reasons for dismissal. The court explained that "in dismissing the case [it] was doing no more than enforcing an agreement entered into by the parties" and that:

> [A]side from this, the case was due for dismissal as a matter of the sound discretion of the Court. This patent litigation in one form or another has been held over the defendants' head for more than eight and a half years. A defendant has the right to have a case promptly decided. This Court, as shown by the Facts outlined above, gave every consideration to the plaintiff in granting extensions of time for pretrial proceedings and trial. The time arrived when the Court was required to act in the interest of fairness and justice

> to bring the case to a conclusion. The recently amended Federal Rules of Civil Procedure have emphasized that a trial court is obligated to exercise control over scheduling and managing litigation assigned to it. The power to invoke the sanction of dismissal is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion of the Court's calendar.

We cannot say that in view of all the circumstances, the district court abused its broad discretion under Rule 41(b) of the Federal Rules of Civil Procedure in dismissing the suit.

The appellant relies upon paragraph 4 of the July 22, 1983 order which says:

> 4. In the event that plaintiff [appellant] fails to proceed in accordance with the schedule set forth in paragraph 2, whether because of a failure to abide [by] the terms of the contingency arrangement with Irons and Sears (resulting in the withdrawal of other reason, this case will be dismissed with prejudice. [Emphasis added.]

That provision, however, must be considered in light of the plaintiff's recognition and commitment at the hearing on July 22, 1983, that if he failed to pay his lawyer, the suit would be dismissed. That understanding was not ambiguous. When the appellant failed to live up to his commitment, the court was fully justified in doing what it said it would do.

Appellant argues he was not advised of his statutory right to proceed pro se. The trial court's April 15, 1983 order, however, said, "in the event substitute counsel does not appear of record on or before May 16, 1983, this case shall be prosecuted by the Plaintiff [appellant] pro se."

Appellees' request for an award of double fees and such other damages as

this court may deem appropriate, Rule 38, Federal Rules of Appellate Procedure, is denied.